No. 857 117

IN THE

Supreme Court of the United States

October Term, 1954

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

STATEMENT AS TO JURISDICTION

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In compliance with Rule 13 of the Rules of the Supreme Court of the United States, as revised, The Denver & Rio Grande Western Railroad Company submits herewith its statement particularly disclosing the basis on which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause December 20, 1954. Notice of appeal was filed in the District Court February 3, 1955. As the

result of a motion duly filed in the District Court by appellant, the time within which the appellant may docket the cause and file the record thereof with the Clerk of the Supreme Court of the United States was by order of the District Court entered March 22, 1955, enlarged from April 4, 1955 to June 1, 1955.

OPINIONS BELOW

The opinion of the District Court for the District of Nebraska, Omaha Division, is not yet reported. A copy is attached hereto as Appendix A. A copy of the Final Judgment of the District Court entered December 20, 1954 is also attached as Appendix B. The decision of the Interstate Commerce Commission is reported as *Denver and R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611.

JURISDICTION

The jurisdiction of the Supreme Court to review the decision in this case is conferred by 28 U.S.C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of this court to review the judgment on direct appeal. *Pennsylvania R. Co.* v. *United States*, 323 U.S. 588, *U. S.* v. *Capital Transit Co.*, 325 U.S. 357, *New York* v. *United States*, 331 U.S. 284 and *United States* v. *Great Northern Railway*, 343 U.S. 562.

QUESTIONS PRESENTED

The questions presented arise out of the decision and order of the Interstate Commerce Commission of January 12, 1953, which on the complaint of the appellant, herein called the Rio Grande, and others prescribed joint through rates and competitive through routes applicable to certain commodities (287 I.C.C. 611 at p. 659) via the Ogden, Utah gateway and the Rio Grande between points on the Union Pacific Railroad Company in Washington, Oregon, Idaho, Northern Utah and Montana and points such as Denver, Colorado Springs and Pueblo,

Colo., and points east thereof on the lines of the defendant railroads. The Commission found that joint competitive through rates and through routes on the traffic covered by its order are necessary and desirable in the public interest to provide adequate and more economic transportation and that the existing rates and charges on the same traffic are and for the future will be unjust and unreasonable and unduly prejudicial to shippers and receivers using or desiring to use the routes of the Rio Grande and unduly preferential of shippers and receivers using the routes of the Union Pacific Railroad Company and other defendants. The Commission also found that in the maintenance by the Union Pacific Railroad and other rail defendants of joint rates between the northwest area described, on the one hand, and points on the Bamberger Railroad Company south of Ogden, on the other hand, while refusing to maintain like rates to and from the same points on the line of the appellant south of Ogden subjects the appellant to discrimination in violation of Section 3(4) of the Interstate Commerce Act.

Upon the suit of the Union Pacific Railroad Company and certain other railroads filed in the District Court, the validity of the order of the Commission was assailed on various grounds. That court sustained the order of the Commission in part and overruled it in part. All of the principal parties have filed notices of appeal.

The questions presented on this appeal are:

1. Whether the District Court erred in overruling certain findings of fact and conclusions of law of the Interstate Commerce Commission.

2. Whether the court erred in holding in paragraph III of its Conclusions of Law that there is no substantial evidence to support the findings and order of the Commission which requires the establishment of through joint rates and competitive through routes between the Union Pacific Railroad Company, the Rio Grande and other railroads with respect to the commodities and the areas spec-

ified in the order, and in substituting its own judgment and findings by which it modified the scope of the relief granted by the Commission by restricting the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande, accorded in-transit privileges at such points, and are later reshipped to points beyond the Rio Grande.

3. Whether the court erred in interpreting and in applying to the evidence of the case, the provisions of Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act. (49 U.S.C. §§ 3(1), 15(3) and 15(4))

4. Whether the court erred in setting aside, in part, the order of the Commission, which requires the Union Pacific Railroad Company and the other defendants before the Commission to participate with the Rio Grande in the maintenance of through competitive routes and joint rates on the commodities described by the Commission to and from the involved northwest area and the designated area east of Denver, Pueblo and Trinidad, Colorado, whether or not transit privileges are used on the Rio Grande.

5. Whether the court erred in ruling, contrary to the findings of the Commission and the evidence, that on the commodities specified by the Commission the through competitive routes and joint rates required by its order via the Rio Grande to and from the northwest area and a designated area east of Denver, Pueblo and Trinidad, Colorado, are not needed in order to provide adequate and more economic transportation.

6. Whether the court erred in overruling the findings and conclusions of the Commission that as to the commodities specified by the Commission the existing transportation services and facilities via the Union Pacific routes were inadequate and uneconomical between the northwest area and points of destination in a designated area east of Denver, Pueblo and Trinidad, and in substituting its own

finding that the existing transportation services and facilities via the Union Pacific routes are adequate.

7. Whether the court erred in overruling the findings and conclusions of the Commission that the existing rates assailed are and will be unjust and unreasonable, and unduly prejudicial to shippers and receivers using or desiring to use the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes in and to the extent that such rates exceed, or may exceed, the joint rates maintained on the specified commodities from and to the same points over the Union Pacific routes.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended 49 U.S.C. § 1, *et seq.*, are attached hereto as Appendix C.

STATEMENT

The Questions Presented are Substantial

Both the appellant and the appellees claim, *inter alia*, that the District Court misinterpreted three important provisions of the Interstate Commerce Act, namely, paragraphs (1), (3) and (4) of Section 15 and paragraph (1) of Section 3, and the appellees have filed a notice of appeal.

Section 3(1) prohibits and makes unlawful for any carrier to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic in any respect whatsoever; or to subject any of the persons, localities, districts, territories or traffic described to any undue or unreasonable prejudice or disadvantage.

Section 15(1) gives the Commission the power to prescribe just, reasonable, fair and non-discriminatory through rates, including joint rates, when existing rates are found

by it to be unjust, unfair, unreasonable, unduly prejudicial or otherwise in violation of the Act. Section 15(3) provides that the Commission may and shall whenever deemed by it to be necessary or desirable in the public interest prescribe joint through rates and through routes. Section 15(4) provides that in establishing a through route the Commission shall not require any railroad, without its consent, to take less than the entire length of its railroad, except (a) as provided in Section 3 of the Act, (b) where the Commission finds that a through route is needed in order to provide adequate, and more efficient or more economic transportation, and (c) under four other exceptions not here pertinent.

In *Pennsylvania R. Co.* v. *United States,* 323 U.S. 588, 593, the court sustained the decision of the Commission in *Stickell* v. *Alton R. Co.,* 255 I.C.C. 333, 343, where the Commission held that the exception in clause (b) of Section 15(4) means adequate and more efficient and more economic transportation from the public or the shippers' standpoint as well as from that of the carriers. The existence of any of the exceptions nullifies the limitation on the power of the Commission to prescribe through routes.

The questions presented are substantial and important and should be resolved by this court. The opinion of the court below is in certain respects novel and unprecedented since that court not only misconceived the law and the evidence, but acted upon the erroneous assumption that it had the right to prescribe, and did prescribe, its own conception of the appropriate remedy to be applied as a substitute for the remedy the Commission prescribed to cure the wrongs the Commission found to exist.

The District Court Erred in Applying the Pertinent Statutes and in Substituting Its Judgment for That of the Commission on Factual Questions

In weighing the evidence the District Court allowed the incidental question of stopping cars in transit for various purposes, a common commercial practice among shippers and railroads, to control the category and in doing so be-

came confused as to the main issue in the case, which is the need in the public interest for joint through rates and competitive through routes in connection with the traffic and between the areas involved. The testimony before the Commission, as set forth at pages 132-146 of the transcript of the hearing and in Section H of Exhibit 3, shows 22 types of in-transit privileges provided by the Rio Grande in its published tariffs and by other railroads. These privileges permit the reconsignment and the stopping of freight in transit for the purpose of loading or partly unloading, for feeding and grazing of livestock and for merchandising and milling grain, etc. The evidence shows that these and other transit arrangements are commercially ineffective unless they can be used under joint competitive through rates applicable to the commodity from the point of its origin to its ultimate destination.

More than 27 shippers and organizations of shippers, representing over 300,000 persons, intervened as complainants in the complaint of the Rio Grande before the Commission. The testimony of numerous witnesses convinced the Commission of the public need for the joint rates and competitive through routes, the existence of which would not only enable these shippers to reach markets not now available to them, but to enjoy the benefit of competitive transit privileges in route when needed.

The Rio Grande is a common carrier by railroad engaged in the transportation of persons and property in intrastate, interstate and foreign commerce and operates approximately 2,400 miles of railroad in Colorado, New Mexico and Utah. It has interchange track connections and interchanges traffic with the Union Pacific Railroad at Denver, Colo., and at Ogden, Salt Lake City and Provo, Utah, with the Southern Pacific at Ogden and with the Western Pacific at Salt Lake City. It also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo, Colo., with the Santa Fe, the Colorado and Southern, and the Missouri Pacific

Railroad; at Walsenburg, Colo., with the Colorado and Southern, and at Trinidad, Colo., with the Santa Fe and the Colorado and Southern.

In August 1949 the Rio Grande filed a complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroad defendants. The complaint alleged, *inter alia*, that the failure and the refusal of the Union Pacific Railroad and some 216 other defendant railroads to establish joint competitive through rates and routes via the Ogden gateway and the Rio Grande on interstate and foreign freight traffic in carload or trainload quantities in any quantity lots, or in less-than-carload lots, resulted in through rates which are excessive, unjust, unreasonable and discriminatory in violation of Section 1, Section 3 and Section 15 of the Interstate Commerce Act, and was and is contrary to the national transportation policy since it deprives the public, shippers, and the Rio Grande of the use of available and reasonable through routes and rail facilities at just, reasonable and non-discriminatory through joint rates which were and are necessary and desirable in the public interest.

At Ogden, Utah, looking west, the Union Pacific has two diverging lines of railroad which are in the shape of a large "Y". One line extends in a southwesterly direction through Salt Lake City and Provo, Utah, and Las Vegas, Nev., to Los Angeles, Calif. Between points on that line and Colorado common points and points east thereof, the Union Pacific maintains competitive joint through rates and through routes on all freight traffic in connection with the Rio Grande via Salt Lake City and Ogden. The other line of the Union Pacific extends in a northwesterly direction from Ogden through Utah, Idaho, Oregon, Washington and Montana. This is the territory to and from which the Union Pacific and its connections refuse to maintain joint rates on freight traffic via the routes of the Rio Grande through Ogden or Salt Lake City, except on sheep and goats from that territory to a few points and except on lumber to Canon City, Colo.

The Rio Grande intervened in the court below as a defendant and filed an answer in which it stated that it waived no rights but reserved the right to assail in a court of competent jurisdiction the validity of that part of the order of the Interstate Commerce Commission which imposed territorial and other restrictions in respect to the joint competitive rates prescribed and failed and refused to prescribe the joint rates and competitive routes on all of the traffic and between all of the points involved in the complaint of the Rio Grande before the Commission. Such a suit was later filed by the Rio Grande in the District Court of the United States for the District of Colorado, Civil Action No. 4492, and was decided by that court of three judges on January 13, 1955, not yet reported. That court held that the part of the order of the Commission which denied the relief sought by the Rio Grande is contrary to the evidence, arbitrary and contrary to the applicable statutes. It remanded the case to the Commission. On April 22, 1955, the District Court of Colorado denied the motions of the Union Pacific and others for a new trial or for reconsideration. No notice of appeal has as yet been filed by any of the parties to that suit.

In paragraph I of the Conclusions of Law in the opinion of the Court below, it held that the evidence supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities, in carloads, originating in the northwest area

> "consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities, the order of the Commission is valid under Sections 1, 15(3) and 15(4) of the Act and does not violate the direction of Section 15(4) that reasonable preferences be given the carrier which originates the traffic."

A similar finding was made by the Court below in paragraph II of its Conclusions of Law as to shipments of marble and granite monuments, in carloads, from points in Vermont and Georgia to points of final destination in the Northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area.

In paragraph III of the Conclusions of Law the District Court held that:—

> "To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15(4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destination specified in this paragraph, that factual premise, essential to the validity of the order, is lacking."

As shown, the District Court found that the order of the Commission is invalid as applied to the traffic not originally consigned to points on the Rio Grande west of Denver, Pueblo and Trinidad, accorded transit privileges at such points, and then reshipped to points east of Denver, Pueblo and Trinidad. While the Commission was rightly influenced by the evidence which showed a wide spread demand for the existing transit privileges pro-

vided by the Rio Grande and its rail connections, it understood, what the court below did not, that what the shippers needed to make the existing transit privileges commercially available is the establishment of joint competitive rates via the routes of the Rio Grande. It is obvious that the District Court in attempting to weigh the significance of the evidence, came to the erroneous conclusion that the joint rates prescribed by the Commission are necessary only as to traffic accorded transit privileges at points on the Rio Grande.

The court not only erred in weighing the evidence as against the finding of the Commission, but misconceived the issues and the evidence. To illustrate: The evidence shows that a shipment of a carload of vegetables from a point on the Union Pacific in Idaho or Oregon might be initially consigned to Wichita, Kans., or to other points beyond the line of the Rio Grande and the shipper might find while the car is rolling or after it reached its billed destination that a better price could be obtained for the vegetables at say, Kansas City or Tulsa, Okla., or at Pueblo or Denver. Under the decision of the District Court the joint rates, the need of which is the pivotal issue, would not apply to shipments handled as described in the example.

The District Court appears to have been influenced in its conclusion by a misconception of *Central R. Co. of New Jersey* v. *United States*, 257 U.S. 247. In that case joint rail rates on lumber were maintained by southern and northern railroads from points in the south to points in the north, including points in New Jersey. Railroads in the south provided creosoting in transit privileges at points on their lines, but the Central Railroad of New Jersey and other northern railroads did not provide for creosoting in transit at Newark, N. J., or at other northern points. Upon the complaint of the American Creosoting Company, 61 I.C.C. 145, the Commission found that the refusal of the northern railroads to provide creosoting in

transit at Newark was unduly prejudicial to the complainant. This court reversed the Commission on the premise that transit at particular points is a local matter to be determined by the interested railroads and that the Commission misconstrued Section 3(1) of the Interstate Commerce Act in finding that the refusal of the northern railroads to provide for creosoting in transit at Newark was unduly prejudicial. But this court did not hold that the undue prejudice and undue preference prohibited by Section 3(1) of the Interstate Commerce Act is a local matter as the District Court seems to have assumed. See in this connection *New York* v. *United States*, 331 U.S. 284, 342. The Supreme Court merely held that the granting or the withholding of transit at a particular point is a local matter to be determined by the railroad. This court also held that under the provisions of Section 1 of the Interstate Commerce Act, which require railroads to maintain just and reasonable rates, charges, regulations and practices, the Commission has the power to decide under that section whether a particular transit privilege should be granted. (257 U.S., at p. 257)

The District Court also erred in holding in paragraph III of its Conclusions of Law that the evidence does not justify the finding by the Commission that the establishment of the joint rates and through routes prescribed are necessary and desirable in the public interest to provide adequate and more economic transportation on the traffic involved and therefore that the order is invalid under the limitation on the Commission's power to prescribe through routes in Section 15(4) of the Interstate Commerce Act. In that conclusion the court disregarded the fact that the limitation on the power to prescribe through routes is subject to six exceptions which provide that the limitation does not apply:—

1. Where the defendant railroad or railroads consent to take less than their long haul,

2. Where discrimination and undue prejudice is found under Section 3 of the Interstate Commerce Act,

3. Where one of the carriers in the route is a water carrier,

4. Where the route or routes sought to be protected by railroads are unreasonably long compared with another practical through route which could otherwise be established,

5. Where the Commission finds that the through route proposed or sought "is needed in order to provide adequate, and more efficient or more economic transportation,"

6. Where the Commission requires the establishment of temporary through routes as necessary and desirable in the public interest because of a shortage of equipment, congestion of traffic or other emergency found by the Commission to exist.

Since the Commission found that the rates assailed by the Rio Grande were unduly prejudicial and preferential in violation of Section 3 of the Interstate Commerce Act and that through routes and joint rates are necessary and desirable in the public interest to provide adequate and more economic transportation, it is clear that if either of these findings are supported by evidence the limitation on its power to prescribe through routes does not apply. They are supported by the evidence. The District Court did not give any real consideration to the exceptions to the limitation on the power of the Commission to prescribe through routes. This court should keep in mind that the limitation in Section 15(4) relates to the power of the Commission to prescribe through routes and not to its power to prescribe reasonable and non-discriminatory through rates. This is clearly indicated by the decisions of this court in *Virginian Railway Company* v. *United States*, 272 U.S. 658, 667, and *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U.S. 768, 776. Since these decisions are to the same effect, it will be sufficient to quote from the decision in the *Virginian Rail-*

way case in which, at page 667, this court said apropos of this question:

> "Section 15(3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law."

In dealing with the question of undue prejudice and preference prohibited by Section 3(1) of the Interstate Commerce Act, the District Court misconceived the facts on which the Commission based its findings, as well as the scope and purpose of that section and of the issues before the Commission for decision. The District Court said in part apropos of Section 3(1) that: (p. 11a)

> "If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3(1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15(4) heretofore considered. But the prejudice and preference prohibited by Sec. 3(1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3(1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3(1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion."

The District Court failed to grasp that while the Union Pacific was the principal defendant in the complaint before the Commission there were over 200 other rail defendants with which the Union Pacific participated in joint competitive rates and through routes and that the joint rates sought by the Rio Grande are the same in amount as the rates generally maintained by the railroad defendants

on transcontinental and other traffic eastbound and westbound. Although the Union Pacific is the principal source and cause of the unjust discrimination claimed and found to exist by the Commission, it is not the only source. On the contrary, the other railroad defendants before the Commission act and acted in conjunction with the Union Pacific and are in *pari delicto* since the undue prejudice and preference found by the Commission could not exist unless they participated with the Union Pacific in maintaining the preferential joint competitive rates via various junction points with each other, while refusing to maintain similar joint competitive rates in connection with the considered traffic between the areas involved via Ogden or Salt Lake City and the Rio Grande.

The language of Section 3(1) and the numerous decisions of this Commission and of the courts make it clear that a finding of undue prejudice and preference as between two or more origin or destination groups or as to territories or regions may be validly made if the defendants serve both groups either directly or indirectly through connecting lines. This doctrine was pointedly recognized by this court in *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U.S. 136, 38 S. Ct. 49, 52, where the court stated that localities and shippers require protection as much from combination of connecting carriers as from a single carrier whose rails reach them. See also *Texas & P. Ry. Co.* v. *United States*, 289 U.S. 627, 650; *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U.S. 287; *State of New York* v. *United States*, 331 U.S. 284, 345, and *Ayrshire Collieries Corporation* v. *United States*, 335 U.S. 573, 593. In the *State of New York* case, 331 U.S., at page 341, this court said: "A proper finding of unlawful discrimination under Section 3(1) thus enables the Commission not only to direct the carriers to eliminate the practice but also, pursuant to Section 15(1) to prescribe the alternative," and at page 342 this court also said:

> "Once the Commission has found rates to be 'unjust or unreasonable or unjustly discriminatory or unduly

preferential or prejudicial,' it is empowered to prescribe rates which are 'just and reasonable' or 'the maximum or minimum, or maximum and minimum, to be charged * * *.' § 15(1)"

The Commission made such findings in this case.

CONCLUSION

For the reasons stated, we urge that jurisdiction be noted and that the judgment of the court below be reversed in respect to the issues and questions raised by this appeal.

Respectfully submitted,

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PROOF OF SERVICE

I, ROBERT E. QUIRK, one of the attorneys for the appellant, The Denver & Rio Grande Western Railroad Company, and a member of the bar of the Supreme Court of the United States, hereby certify that on May 31, 1955, I served copies of the foregoing Statement As To Jurisdiction on the several parties as follows:

1. On the United States by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

E. Riggs McConnell, Esq.
Special Assistant to the Attorney General
Department of Justice
Washington 25, D. C.

and with air-mail postage prepaid to:

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2. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

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3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Edward M. Reidy, Esq.
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4. On the Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis and Omaha Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Northern Pacific Railway Company; Great Northern Railway Company, plaintiffs; and employee organization of Union Pacific Railroad Company, intervening

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5. On the State of Nebraska and the Nebraska State Railroad Commission; Washington Public Service Commission; Public Utilities Commission of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization of Wyoming; Public Service Commission of Wyoming; Public Service Commission of Utah; National Livestock Producers Association, by mailing a copy in a duly addressed envelope with air-mail postage prepaid to their respective attorneys of record, as follows:

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